FULL BENCH

Before Mr. Justice Bisheshwar Nath Srivastava, Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

MUSAMMAT GHURAN (OPPOSITE-PARTY-APPELLANT) *v.* S. RIAZ AHMAD (APPLICANT-RESPONDENT)* 1935 *September* 6

Guardians and Wards Act (XXVII of 1890), sections 4(2), 4(3), 19 and 25—Mohammadan law—Minor daughter of Mohammedan living with his maternal grandmother—Father, whether guardian of person of minor daughter—"Ward", whether includes minor having no guardian appointed by Court—Daughter, not allowed to see his father—Father not allowed to look to minor's education and upbringing—"Removal from custody of guardian"; meaning of—Custody of minor, father when entitled to.

The definition of "guardian" in section 4(2) of the Guardian and Wards Act is very wide and must include a father who is admitted on all hands and in every system of law to be the natural guardian of his children. A Mohammadan father is, therefore, the guardian of the person of his minor daughter and even while she is residing with her maternal grandmother the minor is in the care and the constructive custody of the father though not in his actual physical custody. *Ulfat Bibi* v. *Bafati* (1), *Siddiqun Nisa Bibi* v. *Nizamuddin Khan* (2), and *Mushaf Husain* v. *Muhammad Jawad* (3), relied on.

The definition of "ward" in section 4(3) of the Guardians and Wards Act is wide enough to include every minor who has a guardian, even though the guardian may not be appointed under the Act.

Where a minor girl is not allowed to go to her father's house and the father is not even allowed to see and approach her and is thus deprived from all control over her education and upbringing, the girl must be deemed to have been removed from the custody of her father, the *de jure* guardian of her person, and the father is entitled to the custody of his minor daughter, under section 25 of the Guardians and Wards Act.

Siddiqun Nisa Bibi v. *Nizamuddin Khan* (2), relied on.

*Miscellaneous Appeal No. 7 of 1933, against the order of M. Humayun Mirza, Subordinate Judge of Malihabad, at Lucknow, dated the 11th of November, 1932.

(1) (1927) A.I.R., All., 581. (2) (1931) I.L.R., 54 All., 128.
(3) (1918) 21 O.C., 194.

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The case was originally heard by a Bench consisting of the Hon'ble the Chief Judge and Mr. Justice H. G. Smith who referred certain important questions of law to a Full Bench for decision. The referring order of the Bench is as follows:

SRIVASTAVA, AG.C.J. *and* SMITH, J.:—This appeal was referred by one of us to a Bench of two Judges because of the conflict of judicial opinion existing on certain questions of law relating to the Guardians and Wards Act which were involved in the case.

The facts of the case are that the respondent, Riaz Ahmad, was in railway service in Cawnpore, and has now retired on pension. In 1925, when his wife was in the family way, he sent her to the house of her mother in Lucknow for confinement. She had a daughter aged about 2 years who accompanied her to Lucknow The wife was delivered of a child, but soon after the mother and the new-born child both died in the house of Musammat Ghuran, the mother-in-law of Riaz Ahmad. The girl who had accompanied her mother to the house of Musammat Ghuran has ever since continued to live with the latter, and is now about eleven years old. The respondent wanted to get the girl, who is his only child, into his custody, but his mother-in-law did not agree to it. The respondent thereupon made an application under section 25 of the Guardians and Wards Act to recover the custody of the girl from Musammat Ghuran. He also asked that he should be appointed guardian of the person of the minor. Musammat Ghuran made a counter application that she should be appointed guardian. The learned Sub-Judge held that in view of the provisions of section 19 of the Guardians and Wards Act, the father of the minor being alive and not unfit to be guardian of the person of the minor, no guardian could be appointed, but he held that the father was entitled to demand the custody of the minor under section 25 of the Act, and being of opinion that the necessary conditions of that section were satisfied in the case, he ordered Musammat Ghuran to hand over the minor to Riaz Ahmad. Musammat Ghuran has come to this Court in appeal against this order of the Subordinate Judge.

It has been argued on behalf of the appellant that section 19 of the Guardians and Wards Act does not justify the inference that the further, if alive and not unfit to be the guardian, must be treated as the "*de jure*" guardian of the minor. It has further been contended that the maternal grand-mother has a

preferential right of *Hizanat* in the case of a minor female, and must therefore be treated as the "*de jure*" guardian under the Mohammadan law. The argument proceeded that the provisions of section 19 of the Guardians and Wards Act ought not to be interpreted so as to abrogate the provisions of the personal law. Reference was also made to the definition of "guardian" contained in section 4 of the Guardians and Wards Act, and it was argued that the father, even on the facts found by the lower Court, could not be regarded as a guardian within the definition given in the section. In the result it was argued that section 25 had no application to the case, because the respondent was not a guardian of the person of the minor, and also because the minor could not, on the admitted facts of the case, be said to have been removed from his custody. The learned Counsel for the appellant also criticised the judgment of a Bench of the Allahabad High Court in I. L. R., 54 All., 128 which has been relied upon by the lower Court, contending that while the principles enunciated by the learned acting Chief Justice in the course of his judgment were correct, and supported the appellant, yet the conclusion reached by him was not consistent with those principles.

We are of opinion that some of the questions stated above are by no means free from difficulty. We think that there being no decision of this Court on those points, and in view of their importance, we should refer the following questions for decision by a Full Bench:

(1) The maternal grand-mother of the female minor being entitled to the custody (*Hizanat*) of the minor, is she to be regarded as the guardian of the person of the minor under the Mohammadan law?

(2) Are the provisions of the Mohammadan law to be deemed to have been superseded by section 19 of the Guardians and Wards Act, and the father not being unfit to be guardian of the person of the minor, is he to be regarded as the guardian by reason of the provisions of clause (*b*) of that section?

(3) Can the father, in the circumstances of the present case, be held to be the guardian of the person of the minor within the definition contained in section 4, clause (2) of the Guardians and Wards Act?

(4) Can the minor, in the circumstances of the case, be said to have left, or to have been removed from the custody of a guardian within the meaning of section 25 of the Guardians and Wards Act?

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Mr. *M. H. Kidwai,* for the appellant.

No one for the respondent.

ZIAUL HASAN, J.:—In this appeal which raises some questions of Mohammadan law relating to the custody of minors, the following questions have been referred to the Full Bench:

(1) The maternal grand-mother of the female minor being entitled to the custody (*Hizanat*) of the minor, is she to be regarded as the guardian of the person of the minor under the Mohammadan law?

(2) Are the provisions of the Mohammadan law to be deemed to have been superseded by section 19 of the Guardians and Wards Act, and the father not being unfit to be guardian of the person of the minor, to be regarded as the guardian by reason of the provisions of clause (*b*) of that section?

(3) Can the father in the circumstances of the present case, be held to be the guardian of the person of the minor within the definition contained in section 4, clause (2) of the Guardians and Wards Act?

(4) Can the minor, in the circumstances of the case, be said to have left, or to have been removed from the custody of a guardian within the meaning of section 25 of the Guardians and Wards Act?

As the above questions have a reference to the particular facts of the case it is necessary to state those facts. They are as follows. In 1925 the respondent Riaz Ahmad, who was then in the Railway service at Cawnpore, sent his wife to the house of her mother, Musammat Ghooran, the appellant, in Lucknow for the sake of her confinement. She had a daughter named Jafri Khatun aged about two years and she also came to Lucknow with her mother. The respondent's wife gave birth to a child but soon after the birth the child as well as the mother died. The minor Jafri Khatun has since then been living with Musammat Ghooran. Riaz Ahmad wanted to take his minor daughter into his custody but was not allowed to do so by the appellant.

He, thereupon, made an application under section 25 of the Guardians and Wards Act and also prayed to be appointed guardian of the minor's person. A counter application was filed by Musammat Ghooran praying that she might be appointed guardian of the person of the minor. The learned Subordinate Judge of Malihabad, who dealt with the case, came to the conclusion that in view of section 19 of the Act no guardian could be appointed, but held that Riaz Ahmad was entitled to the custody of the minor under section 25. He accordingly ordered Musammat Ghooran to hand over the minor girl to Riaz Ahmad. It is against this order that Musammat Ghooran has appealed to this Court.

To return to the questions referred to the Full Bench. I take up the 3rd question first.

My answer to the question is in the affirmative. "Guardian" has been defined in section 4(2) of the Act as "a person having the care of the person of a minor . . ." Now, in the first place this definition is very wide and must include a father who is admitted on all hands and in every system of law to be the natural guardian of his children. In the case of *Musammat Ulfat Bibi* v. *Bafati* (1) it was held by WALSH and BANERJI, JJ., that by the Mohammadan law the father is the natural lawful guardian of his minor boy and that side by side with the right of the father as the lawful guardian exists the recognized right of the mother by Mohammadan law to have the custody of the child up to the age of seven. In the case of *Siddiqun Nisa Bibi* v. *Nizamuddin Khan* (2), the CHIEF JUSTICE and Mr. SEN, J., held that any person who has the care of the person of a minor is a guardian of the person of the minor according to the definition contained in section 4, clause (2) of the Act and that consequently the father is the guardian within the meaning of the Act, although he cannot be appointed as such. The following remarks

(1) (1927) A.I.R., All., 581. (2) (1931) I.L.R., 54 All., 128.

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of Mr. J. LINDSAY in the case of *Mushaf Husain* v. *Mohamad Jawad* (1) are very apposite on the point: " . . . the definition (of 'guardian' in section 4 of the Act) does not in my opinion justify the notion that the 'guardian' must be a person having actual custody of the minor. The word used in the definition is 'care' and not 'custody'; as their Lordships out in the Madras case cited above—*Besant* v. *Narayaniah* (I. L. R., 38 Mad., 807)—a guardian may in his discretion entrust the custody and education of his children to another but by doing so he does not cease to be his children's guardian, that being an office which in his lifetime he cannot delegate to a third person". In the second place, even if we take the word "care" in the definition of "guardian" in section 4(2) to be equivalent to "custody" the minor in this case is in the constructive custody of the father, though residing with her maternal grand-mother, and as was pointed out in the case of *Musammat Ulfat Bibi* v. *Bafati* (2) referred to above the right of the mother (or the material grand-mother) to have the custody of the child goes side by side with the father's natural right to guardianship of his child. In *Siddiqun Nisa Bibi's* case (referred to above) also it was held that the mere fact that a female relation is, according to the Mohammadan law, entitled to the custody of the person of a minor girl up to a certain age would not result in the father not being the natural guardian of the child and that the custody of such person would be the constructive custody of the father. I am, therefore, of opinion that Riaz Ahmad is guardian of the person of Jafri Khatun within the meaning of section 4(2) of the Guardians and Wards Act.

The fourth question is whether the minor in the present case can be said to have left or to have been removed from the custody of a guardian within the meaning of section 25 of the Guardians and Wards Act.

(1) (1918) 21 O.C., 194. (2) (1927) A.I.R., All., 581.

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From my answer to the 3rd question it follows that this question must also be decided in the affirmative. Section 25(1) runs as follows: If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian. "Ward" has been defined in section 4(3) as "a minor for whose person or property there is a guardian". This definition is to my mind wide enough to include every minor who has a guardian, even though the guardian may not be appointed under the Act. It has already been held that Riaz Ahmad is guardian of the person of his minor daughter Jafri Khatun. It follows therefore that section 25 of the Act would apply in this case provided it is proved that Jafri Khatun has left or has been removed from the custody of Riaz Ahmad. Riaz Ahmad and his witness Khan Bahadur Syed Husain, a retired Deputy Collector, have stated that Musammat Ghooran and her son do not allow the minor to go to her father's house and do not even allow Riaz Ahmad to see or approach her. This evidence has been believed by the court below and nothing has been shown why this Court should not also believe it. In view of this evidence I am of opinion that Jafri Khatun must be deemed to have been removed from the custody of her father, the *de jure* guardian of her person. I am in complete agreement with the view taken in the case of *Siddiqun Nissa Bibi* (1) referred to above, which is a case almost on all fours with the present case. The learned CHIEF JUSTICE remarked (page 138 of the report):

"The custody of the girl with the grand-mother was in law a constructive custody of the father with whose consent and permission she had so far been living at

(1) (1931) I.L.R., 54 All., 128.

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Zamania. When the father served a notice upon the maternal grand-mother that the child should be delivered to him and followed it up by this application the permission was revoked as it was obviously revokable. The refusal of the grand-mother to hand over the child amounted to a removal from the constructive custody of the father. In these circumstances section 25 applies . . ."

For the above reasons I answer the 4th question also in the affirmative and am of opinion that Riaz Ahmad's application was rightly entertained under section 25 of the Guardians and Wards Act.

As regards question 2 I am of opinion that it is not necessary to reply to it, as even under the Mohammadan law Riaz Ahmad was entitled to the custody of Jafri Khatun in the circumstances of the case. I have already referred to the fact that according to the evidence in the case the appellant did not allow the respondent even to see his daughter. The late Mr. Ameer Ali in his book on Mohammadan law (Volume II, page 260, fifth edition) says, "The right of *Hizanat* is also liable to forfeiture in case the *Hazina* removes the child without the consent of its father or guardian to such a distance from his usual place of residence as would prevent him from exercising the necessary supervision or control over her". The reason given in this passage for forfeiture of the right of *Hizanat* would *a fortiori* apply to a case in which the *Hazina* wilfully prevents the father and natural guardian of the minor from having anything to do with the minor. I am, therefore, of opinion that the order of the learned Subordinate Judge under section 25 of the Guardians and Wards Act was correct and must be upheld.

In view of the above it is not necessary to give a reply to question No. 1.

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SRIVASTAVA, J.:—I agree. In my opinion *Hizanat* is only custody for the rearing up of the child. Although the maternal grand-mother has the right of *Hizanat* under the Mohammadan law yet the father is respon-

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sible for providing funds for the maintenance of the minor and is her natural guardian. Thus he must be deemed to have the care of the person of the minor within the meaning of the definition of "guardian" in section 4(2) of the Guardians and Wards Act even though the minor is not in his actual physical custody.

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The lower Court has given good reasons for holding that it would be for the welfare of the minor that she should be restored to the custody of the father. The girl has reached an age when her education should be taken up in earnest and when according to Eastern notions, some thought ought to be bestowed about her settling in life in future. The relations between the parties are bitterly strained and while the minor remains in the custody of the grand-mother, it would be impossible for the father to exercise any control over her education and upbringing. Thus the conduct of the maternal grand-mother in refusing the father access to his daughter and in depriving him of all control over her education and upbringing must, in the circumstances of the case, be held to amount to the removal of the child from the custody of its guardian within the meaning of section 25 of the Guardians and Wards Act.

THOMAS, J.:—I agree.

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BY THE COURT:—(SRIVASTAVA, THOMAS, and ZIAUL HASAN, JJ.):—Questions 3 and 4 are answered in the affirmative, and in view of these answers the Court considers it unnecessary to decide questions 1 and 2.

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SRIVASTAVA and SMITH, JJ.:—This is an appeal against an order of the Subordinate Judge of Malihabad, Lucknow, passed in a proceeding under the Guardians and Wards Act. The facts of the case have been fully stated in our order, dated the 4th of August, 1934, referring the questions raised by the appellant for decision by a Full Bench. The Full Bench has answered questions 3 and 4 in the affirmative, and in view of those answers has not considered it necessary to decide questions 1 and 2. The answers given to questions 3 and 4

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are decisive of the contentions of the appellant. No other contentions being raised, the result of the Full Bench decision is that the appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL

Before Sir C. M. King, Knight, Chief Judge and Mr. Justice Ziaul Hasan

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THAKUR GOBARDHAN SINGH AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* LALA HAZARI LAL, PLAINTIFF AND ANOTHER (DEFENDANTS-RESPONDENTS).*

United Provinces Encumbered Estates Act (XXV of 1934), sections 6 and 7—Civil Procedure Code (Act V of 1908), order XL, rule 1—Mortgage decree—Receiver, whether can be appointed in a mortgage decree—Appeal pending against order of appointment of Receiver—Order passed by Collector under section 6, Encumbered Estates Act—Order of appointment of Receiver, if can be stayed under section 7, Encumbered Estates Act—"Execution process" in section 7(1)(a), whether includes appointment of Receiver for protection of property.

A Receiver can be appointed under order XL, rule 1 in the case of property in respect of which a mortgage decree has been passed.

Where the order for the appointment of a Receiver had already been made, and the Receiver had already taken possession before the order was made by the Collector under section 6 of the Encumbered Estates Act, but the order for the appointment of a Receiver was under appeal at the date when the Collector transmitted the application to the Special Judge under section 6, the appointment of the Receiver cannot be held to have been a proceeding pending at the date of the Collector's order under section 6.

Where a Receiver is appointed for the purpose of safeguarding and protecting the property which is the subject of a mortgage decree, and not for the purpose of executing the decree the order of appointment is not null and void under section 7(1)(*a*) of the Encumbered Estates Act on the ground that it was an "execution process".

*Miscellaneous Appeal No. 34 of 1934, against the order of Babu Mahabir Prasad Varma, Subordinate Judge of Kheri, dated the 9th of August, 1933.